Antero Harapan Sdn Bhd v Restu Teguh Sdn Bhd (in liquidation)

HIGH COURT (IPOH) — COMPANIES WINDING–UP NO 28NCC-60–10 OF 2014
KOMATHY SUPPIAH JC
31 JANUARY 2017

Companies and Corporations — Liquidators — Application for directions — Liquidator applied from directions from court pursuant to s 237(3) of the Companies Act 1965 ('the CA') — Whether liquidator had full powers under s 236(2) of the CA — Whether liquidator can accept advance from petitioner to acquire land and sell it to petitioner for consideration — Whether land was for residential use — Whether liquidator acted independently in wanting to sell land to the petitioner

Insolvency — Winding up — Liquidator — Liquidator applied from directions from court pursuant to s 237(3) of the Companies Act 1965 ('the CA') — Whether liquidator had full powers under s 236(2) of the CA — Whether liquidator can accept advance from petitioner to acquire land and sell it to petitioner for consideration — Whether land was for residential use — Whether liquidator acted independently in wanting to sell land to the petitioner

This was an application for directions brought by summons in chambers on behalf of the liquidator of Restu Teguh Sdn Bhd ('the respondent'), pursuant to s 237(3) of the Companies Act 1965 ('the CA'). The directions sought pertain to a property held under Lots 13606 and 13587 at Sri Iskandar in Mukim Bota District of Perak Tengah, Perak Darul Ridzuan ('the land'). The respondent had instituted a suit against Majlis Daerah Perak Tengah, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak for damages for a breach of joint venture agreement. This resulted in a consent judgment where the state government agreed to transfer the land to the respondent upon payment of RM5.3m together with RM596,047. These payments were due on 27 October 2016. Via a letter dated 16 May 2016, the liquidator then invited the contributories and petitioner to pay sums pursuant to the consent judgment. The letter expressively provided that the contributories were given first priority to make payments. In a letter dated 30 May 2016 the petitioner informed the liquidator that in the event the contributories were unable to provide the sum of money required than it was willing to purchase the land by way of private treaty. The petitioner vide letter dated 14 July 2016 forwarded a banker's cheque for the sum of RM5.3m and notified its intention to purchase the said land as per terms in the letter dated 30 May 2016. Based on a valuation report

A obtained by the liquidator, the petitioner increased its original offer of RM16.5m to RM17.3m. The petitioner agreed to advance the required amount to acquire the land from the state government provided the liquidator sold the land for a consideration of RM17.3m. The contributories objected and required the liquidator to accept the advance as a loan from the petitioner B to acquire the land and sell it by tender or auction. Hence, the liquidator made this application to determine as to whether he can accept the advance from the petitioner to acquire the land and sell it to the petitioner for consideration of RM17.3m. The contributories raised three objections: (a) no directions ought to be given as the liquidator had full powers under s 236(2) of the CA to sell C properties of the respondent without the court order; (b) the offer of RM17.3m by the petitioner was based on the premise that the land was for residential use but the Form 5A issued by the state authority stated the land was for commercial use, and there was a substantial difference in value between D commercial land and residential land; and (c) the liquidator appeared not to be acting independently in wanting to sell the land to the petitioner.

Held:

E (1) The contention advanced by the contributories that the respondent was the beneficial owner of the land was without foundation. The liquidator could not make any commercial decisions with regards to the land, as it was not an asset of the respondent. Therefore, he could not perforce to hold a tender exercise or public auction of the land as sought by the F contributories. The argument that the liquidator should tender the sale of said land by a public auction was like 'putting the cart before the horse'. The liquidator would have committed an offence if he published the sale of land, neither owned by the respondent nor within his control (see paras 30–31).

G (2) The position taken by the contributories that the petitioner ought to have advanced the requisite sums of money so that the liquidator could auction the said land was wholly untenable. The liquidator cannot borrow money to manage the affairs of the respondent in liquidation. Because the respondent was in liquidation, the only means of raising the H requisite sum pursuant to Form 5A was through an advance made by either the contributories or the creditors for the time being (see para 32).

(3) The respondent had no other assets. Without accepting the advance and the conditions of the petitioner, the liquidator would not be able to secure the land in favour of the respondent. Based on these I circumstances, it was clear that the liquidator had no alternative other than to seek directions pursuant to s 273(3) of the CA as a difficulty had arisen in the course of his administration of the winding up of the respondent. A failure to secure the land would have rendered the liquidation in futility. The liquidator was obliged to inform the court of

his difficulty and to take directions from the court. The questions raised in this application were to protect the liquidator against accusations of acting unreasonably in the discharge of his duties. Therefore the contention that there was no difficulty faced by the liquidator was rejected and the situation in this case was covered by *Re Kian Joo Holding Sdn Bhd (in liquidation); Abdul Jabbar bin Abdul Majid & Anor, applicants* [1999] 6 MLJ 352 (see paras 33 & 35–36).

(4) There was no merit in the objection of the contributories, in that the use of the word 'Perniagaan' in Form 5A indicated that the land was commercial land. The contention that the land use was for commercial and contrary to the clear terms in the consent judgment and letter dated 16 May 2016 from the Pengarah Tanah dan Galian. On the face of these two documents, it was apparent that there was a clerical error or inadvertent mistake in Form 5A (see paras 38–40).

(5) The action of the liquidator in returning a cheque on the basis it was a precarious deal with an unknown party did not demonstrate partiality in any way as the liquidator had no power to sell the land as the same was not an asset of the respondent (see para 42).

(6) In the circumstances of the case, the court directed that in the event extension of time sought on the settlement of the purchase price and the premium in accordance with the consent judgment is refused by the state authority, the liquidator in his capacity as liquidator of the respondent is at liberty to take appropriate steps to secure and sell the land (see para 46).

[Bahasa Malaysia summary

Ini adalah permohonan untuk arahan-arahan yang dibuat oleh saman dalam kamar bagi pihak Restu Teguh Sdn Bhd ('responden'), berikutan s 237(3) Akta Syarikat 1965 ('Akta'). Arahan-arahan yang dipohon berkaitan hartanah yang dipegang di bawah Lot 13606 dan 13587 di Sri Iskandar dalam Mukim Bota Daerah Perak Tengah, Perak Darul Ridzuan ('tanah tersebut'). Responden telah memulakan tindakan terhadap Majlis Daerah Perak Tengah, Pengarah Tanah dan Galian Negeri Perak dan Kerajaan Negeri Perak bagi ganti rugi untuk kemungkiran perjanjian usahasama. Ini mengakibatkan penghakiman izin di mana kerajaan negeri bersetuju untuk memindahkan tanah kepada responden atas bayaran RM5.3 juta bersama dengan RM596,047. Bayaran-bayaran ini kena dibayar pada 27 Oktober 2016. Melalui surat bertarikh 16 Mei 2016, pelikuidasi kemudiannya menjemput penyumbang-penyumbang dan pempetisyen untuk membayar wang berikutan penghakiman izin. Surat tersebut secara nyata menyatakan bahawa penyumbang-penyumbang diberikan keutamaan untuk membuat bayaran. Dalam surat bertarikh 30 Mei 2016 pempetisyen memberitahu pelikuidasi bahawa jika penyumbang-penyumbang tidak dapat memberikan jumlah wang dikehendaki dengan itu ia sanggup membeli tanah tersebut melalui triti

A persendirian. Pempetisyen melalui surat bertarikh 14 Julai 2016 menyerahkan cek jurubank untuk sejumlah RM5.3 juta dan memberitahu niatnya untuk membeli tanah tersebut seperti terma-terma di dalam surat bertarikh 30 Mei 2016. Berdasarkan laporan penilaian yang diperolehi oleh pelikuidasi, pempetisyen menambahkan tawaran asalnya sebanyak RM16.5 juta kepada
B RM17.3 juta. Pempetisyen bersetuju untuk mendahulukan jumlah yang dikehendaki untuk mengambil alih tanah tersebut daripada kerajaan negeri dengan syarat pelikuidasi menjual tanah tersebut bagi balasan sebanyak RM17.3 juta. Penyumbang-penyumbang membantah dan mengkehendaki pelikuidasi untuk menerima pendahuluan tersebut sebagai pinjaman daripada
C pempetisyen untuk mengambil alih tanah tersebut dan menjualnya melalui tender atau lelong. Maka, pelikuidasi membuat permohonan ini untuk menentukan sama ada dia dapat menerima pendahuluan daripada pempetisyen untuk mengambil alih tanah tersebut dan menjualnya kepada pempetisyen bagi balasan sebanyak RM17.3 juta. Penyumbang-penyumbang
D membangkitkan tiga bantahan: (a) tiada arahan-arahan patut diberikan memandangkan pelikuidasi mempunyai kuasa penuh di bawah s 236(2) Akta untuk menjual hartanah responden tanpa perintah mahkamah; (b) tawaran sebanyak RM17.3 juta oleh pempetisyen adalah didasarkan atas prinsip bahawa tanah tersebut adalah untuk penggunaan kediaman tetapi Borang 5A
E yang dikeluarkan oleh pihak berkuasa kerajaan menyatakan bahawa tanah tersebut adalah untuk kegunaan komersial, dan terdapat perbezaan yang substansial dalam nilai di antara tanah komersial dan tanah kediaman; dan (c) pelikuidasi seperti tidak bertindak dengan bebas dalam menjual tanah tersebut kepada pempetisyen.

F

Diputuskan:

(1) Hujahan yang dikemukakan oleh penyumbang-penyumbang bahawa responden adalah pemilik benefisial tanah tersebut adalah tidak asas. pelikuidasi tidak dapat membuat apa-apa keputusan komersial berkaitan
G tanah tersebut, memandangkan ia bukan aset responden. Oleh itu, dia tidak dapat megelak daripada menjalankan tender atau lelongan awam terhadap tanah tersebut seperti yang dipohon oleh penyumbang-penyumbang. Hujahan bahawa pelikuidasi patut tender
H jualan tanah tersebut melalui lelongan awam adalah seperti 'putting the cart before the horse'. Pelikuidasi telah melakukan kesalahan jika ia menerbitkan jumlah tanah tersebut, kerana ia tidak dimiliki oleh responden ataupun dalam kawalannya (lihat perenggan 30–31).

I (2) Kedudukan yang diambil oleh penyumbang-penyumbang bahawa pempetisyen patut mendahulukan jumlah wang yang diperlukan dengan itu pelikuidasi boleh melelong tanah tersebut tidak boleh dipertahankan sepenuhnya. Pelikuidasi tidak dapat meminjam wang untuk menguruskan hal ehwal responden dalam likuidasian. Oleh kerana responden adalah dalam likuidasian, satu-satunya cara untuk

membangkitkan jumlah yang diperlukan berikutan Borang 5A adalah melalui pendahuluan yang dibuat sama ada oleh penyumbang-penyumbang atau pemiutang-pemiutang buat masa ini (lihat perenggan 32).

(3) Responden tidak mempunyai aset lain. Tanpa menerima pendahuluan dan syarat-syarat pempetisyen, pelikuidasi tidak dapat menjamin tanah tersebut dengan memihak kepada responden. Berdasarkan ke atas keadaan ini, ia adalah jelas bahawa pelikuidasi tidak mepunyai alternatif selain daripada memohon arahan-arahan berikutan s 273(3) Akta kerana kesulitan telah berbangkit dalam pentadbirannya membubarkan responden. Kegagalan untuk menjamin tanah tersebut akan menyebabkan pelikuidasian dalam sia-sia. Pelikuidasi bertanggungjawab untuk memberitahu mahkamah mengenai kesulitannya dan untuk mendapatkan arahan-arahan daripada mahkamah. Soalan-soalan yang dibangkitkan dalam permohonan inui adalah untuk melindungi pelikuidasi daripada tuduhan bertindak dengan tidak munasabah dalam menjalankan tugasnya. Oleh itu hujahan bahawa tidak terdapat kesulitan dihadapi oleh pelikuidasi adalah ditolak dan keadaan dalam kes ini dilindungi oleh kes *Re Kian Joo Holding Sdn Bhd (in liquidation); Abdul Jabbar bin Abdul Majid & Anor, applicants* [1999] 6 MLJ 352 (lihat perenggan 33 & 35–36).

(4) Tidak terdapat merit dalam bantahan penyumbang-penyumbang, di mana penggunaan perkataan 'Perniagaan' dalam Borang 5A menunjukkan bahawa tanah tersebut adalah tanah komersial. Hujahan bahawa tanah yang digunakan adalah untuk komersial dan bertentangan kepada terma jelas dalam penghakiman izin dan surat bertarikh 16 Mei 2016 daripada Pengarah Tanah dan Galian. Daripada kedua-dua dokumen ini jelas bahawa terdapat kesalahan perkeranian atau kesilapan yang tidak disengajakan di dalam Borang 5A (lihat perenggan 38–40).

(5) Tindakan pelikuidasi dalam memulangkan cek atas dasar ia adalah urusan tidak tentu dengan pihak yang tidak diketahui tidak menunjukkan pembezaan dalam apa jua cara memandangkan pelikuidasi tidak mempunyai kuasa untuk menjual tanah kerana ianya bukan aset responden (lihat perenggan 42).

(6) Dalam keadaan kes, mahkamah mengarahkan bahawa dalam keadaan pelanjutan masa dipohon untuk pelikuidasian harga belian dan premium mengikut penghakiman izin ditolak oleh pihak berkuasa negeri, pelikuidasi dalam kapasitinya sebagai pelikuidasi responden adalah bebas untuk mengambil langkah yang sesuai untuk menjamin dan menjual tanah tersebut (lihat perenggan 46).]

Notes

For cases on application for directions, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 551–552.

For cases on liquidator, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5424–5439.

Cases referred to

Kian Joo Holdings Sdn Bhd (in liquidation); Abdul Jabbar bin Abdul Majid & Anor, applicants, Re [1999] 6 MLJ 352, HC (refd)

North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals [2013] 3 MLJ 617; [2013] 3 CLJ 1101, FC (refd)

Sanderson v Classic Car Insurances Pty Ltd (1985) 10 ACLR 115, SC (folld)

Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (refd)

Legislation referred to

Companies Act 1965 ss 236, 236(1), (1)(b), (1)(c), (2), (3), (4), 237(1), (2), (3), (4), 292, 241

National Land Code Form 5A

Leong Sai Wah (CK Leong & Co) for the petitioner.

Ganesan Karuppannan (Subashini Ramakrishnan with him) (Ganesan & Irmohizam) for the respondent.

A Mariadass (Mariadass Lock & Ainuddin) for the contributories.

Komathy Suppiah JC:

[1] This is an application for directions brought by summons in chambers on behalf of the liquidator of Restu Teguh Sdn Bhd (in liquidation) ('the respondent'). The application is made pursuant to s 237(3) of the Companies Act 1965 ('the Companies Act').

[2] The directions sought pertain to a property held under Lot 13606 and Lot 13587 at Sri Iskandar in Mukim Bota District of Perak Tengah Perak Darul Ridzuan measuring approximately 52.57 acres ('the land').

BACKGROUND FACTS

[3] Before considering the directions sought, it is helpful to deal briefly with the facts, as outlined by the liquidator's affidavits. The respondent had instituted Civil Suit No 22NCVC-93–09 of 2014 against Majlis Daerah Perak Tengah, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak for damages for breach of a joint venture agreement. It was, however, wound up on 9 February 2015 before the suit could be litigated and Mr Tam Kok Meng was appointed as the liquidator.

[4] On 9 May 2016, a consent judgment was entered in Civil Suit No 22NCVC-93–09 of 2014 between the respondent and Majlis Daerah Perak Tengah, Pengarah Tanah dan Galian Negeri Perak and Kerajaan Negeri Perak. The essential terms of the consent judgment were that:

(a) within three months from the date of the Form 5A the respondent shall cause the payment of the total consideration of RM10.5m together with an additional sum of RM596,047 being the premium and quit rent for the alienation and or transfer of the said land into the respondent's name; and

(b) a sum of RM7m, as part purchase price, already been deposited by the respondent with the solicitors for Majlis Daerah Perak Tengah as stakeholders and the balance of RM3.5m being the balance purchase price together with RM596,047 shall be paid within three months from the date of Form 5A.

[5] By the aforesaid consent judgment, the state government agreed to transfer the land to the respondent upon payment of RM3.5m together with RM596,047. The last day for making the payments due under the consent judgment was 27 October 2016.

[6] By letter dated 16 May 2016 the liquidator forwarded a copy of the said consent judgment to the contributories and the petitioner. The contributories and the petitioner were invited by the liquidator to pay the sums pursuant to the consent judgment, namely the sum of RM3.5m together with RM596,047 to be deposited with the liquidator on or before 15 July 2016. The letter expressly provided that the contributories were given the first priority to make the payments and that time was of the essence and no extension of time will be given.

[7] The contributories vide their solicitors' letter dated 30 May 2016 informed that they had made arrangements for the said payments and would revert within 14 days from the date thereof.

[8] The petitioner by its letter dated 30 May 2016 informed the liquidator that in the event the contributories were unable to provide the sum of money required than it was willing to purchase the land by way of a private treaty.

[9] The petitioner vide its letter dated 14 July 2016 forwarded a banker's cheque for the sum of RM3.5m and notified its intention to purchase the said land as per the terms stated in its letter dated 30 May 2016.

[10] On 22 July 2016 the liquidator obtained a valuation report from Jordan Lee & Jaafar Sdn Bhd which stated that the market value of the said land was

RM17.2m. The petitioner then increased its original offer of RM16.5m to RM17.3m. The petitioner agreed to advance the required amount to acquire the land from the state government provided the liquidator sold the land to it for a consideration of RM17.3m. The contributories objected and required the liquidator to accept the advance as a loan from the petitioner to acquire the land and sell it by tender or auction.

[11] This prompted the liquidator to make this application to seeks directions of the court on how to proceed as the respondent has no other assets. This direction sought by the liquidator is whether he can accept the advance from the petitioner to acquire the land and sell it to the petitioner for the consideration of RM17.3m.

POWERS OF THE LIQUIDATOR

[12] It is a basic point in the law of company liquidation that the liquidator is the officer of the court. The liquidator of a company has a number of duties. One duty is to investigate the affairs of the company and the conduct of its business activities. The liquidator is also obliged to take into his or her custody, or under his or her control, all the property to which the company is or appears to be entitled. The liquidator's powers and duties are found in s 236 of the Companies Act. The exercise by the liquidator of the powers conferred by this section is subject to the control of the court.

[13] Section 236(1) provides that the liquidator of a company is empowered to carry on the business of the company, in so far as is necessary for the beneficial disposal or winding up of the business; to pay any class of creditors in full, subject to the requirements of the legislation; and to make any compromise or arrangement with creditors or persons claiming to be creditors or alleging that they have a claim against the company. Certain other powers are conferred on the liquidator by s 236(2). These include the power to sell the properties of the company.

[14] A liquidator may encounter many complications that arise in winding up the affairs of a company. To assist him in this regard, s 237(3) of the Companies Act provides liquidator may apply to the court for directions in relation to any particular matter arising under the winding up.

THE ARGUMENTS

[15] Counsel for the liquidator contends that the liquidator faces difficulty in relation to the management of the affairs of the respondent in light of the inability of the contributories to make the payments required under the consent judgment to secure the land. He summarises the difficulty as below:

(a) the respondent although it has secured the consent judgment does not own the land;

(b) the respondent is not a beneficial owner of the land and only upon the full settlement of the purchase price, equity would accord the respondent with all the rights and privileges of a legal owner over the land;

(c) in order to be a beneficial and legal owner of the land the respondent has to pay the sum of RM3.5m as balance purchase price and RM596,047 as required under the said consent judgment and Form 5A;

(d) the said sums of RM3.5m and RM596,047 are required to be paid on or before 27 October 2016, time is of essence;

(e) the contributories had been accorded the first priority to advance the said sums of money on or before 15 July 2016 to enable the respondent to become the beneficial and legal owner of the land but have failed and or neglected to do so;

(f) liquidator obtained a valuation on the land indicating the market price is at RM17.2m;

(g) however, the petitioner as the only creditor has offered to advance the said sums of money on condition that the land is sold to it at a purchase consideration of RM17.3m;

(h) the respondent has no other assets;

(i) the contributories are alleging that the respondent is a beneficial owner of the land, thus liquidator ought to tender the sale of the said land by a public auction so that it may fetch a higher price; and

(j) in the absence of a committee of inspection and faced with difficulty arising in the course of his administration of the winding-up the to take directions of this honourable court on how to treat, implement or carry out the payment of the required sums of money by the petitioner being the only creditor to secure the said land and the sale thereof.

[16] In response, counsel for the contributories raises three objections to the proposed sale. First, no directions ought to be given as the liquidator has full powers under s 236(2) to sell properties of the respondent without a court order. The liquidator must make a commercial decision as the legislature intended it to be. The application is contrary to the decision in *Re Kian Joo Holdings Sdn Bhd (in liquidation); Abdul Jabbar bin Abdul Majid & Anor, applicants* [1999] 6 MLJ 352, where the High Court held that a liquidator should not seek the sanction of the court to sell properties of a company in liquidation.

[17] Secondly, that the offer of RM17.3m by the petitioner is based on the premise that the land is for residential use. However, the Form 5A issued by the state authorities pursuant to the consent judgment states the land is for commercial use. There is a substantial difference in value between commercial land and residential land. And, thirdly, the liquidator appears not to be acting independently in wanting to sell the land to the petitioner.

SECTIONS 236 AND 237

[18] The statutory provisions material to this application are contained in ss 236 and 237(2) of the Companies Act:

Section 236:

(1) The liquidator may with the authority either of the court or of the committee of inspection:

(a) ...

(b) subject to section 292 pay any class of creditors in full;

(c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any acclaim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(d) ...

(2) The liquidator may —

(a) ...

(b) ...

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) ...

(3) The exercise by the liquidator of the power conferred by this section shall be subject, to the control of the court and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

Section 237:

(1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection,

and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.

(2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

(4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[19] It is to be noted that although sub-s (3) to 237 permits the liquidator to apply to the court for directions in relation to any particular matter arising under the winding up, it does not provide any guidance as to when it can be used. In giving directions, the court must be mindful that s 236(4) of the Companies Act requires the liquidator is to use his discretion in the exercise of his statutory powers and functions. The liquidator who has made full disclosure of all material facts will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.

CASE LAW

[20] The Supreme Court of New South Wales in *Sanderson v Classic Car Insurances Pty Ltd* (1985) 10 ACLR 115 made the following observation with regard to the Australian equivalent of s 237(3):

> Although s 379(3) of the Companies Code ('the Code') is expressed in wide terms, it seems to me clear that it does not permit the liquidators or a provisional liquidator to come to the court whenever he feels some unease about a situation and wishes to obtain some sort of insurance against the possibility of error, as well as assurance that he is on the right track. A liquidator is an officer of the court, and the modern liquidator today performs many of the functions which in former ages were dealt with by a judge, master or registrar, at least in the first instance. In addition, the persons eligible to be registered as liquidators and to be appointed liquidators only are so eligible because they possess not only the appropriate qualifications in accountancy, but also are experienced in the world of commerce. The Companies Code and the orders of the court these days usually commit the entire conduct of the liquidation to the liquidator, and empower him to do what in his commercial judgment he thinks best in the interests of the creditors as a whole, leaving persons aggrieved to their remedy by appeal to the court, and also leaving the liquidator free where he can forsee a challenge to the powers, or where there is some extremely difficult problem, to apply to the court whose officer he is for directions ...

A However, it is also true to say that virtually all the cases on s 379(3) of the Code or its predecessors involve one of the following four classes of cases:

(a) A guidance to the liquidator on matters of law;

(b) Questions involving legal procedure;

B (c) Whether a liquidator should act on his commercial judgment to postpone a sale because he recognizes his legal duty ordinarily recognizes him to reduce the company's assets into cash as soon possible and to distribute; or

(d) Where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the C liquidator has acted mala fide or in an absurd or unreasonable or illegal manner way.

Essentially, then, though there is wide jurisdiction given to the court under s 379(3) of the Code, it is usually only proper to exercise that power where the matter D involves guidance to the liquidator on matters of law or principle or to protect him against accusations of acting unreasonably. The court does not usually consider it proper to intervene and make the liquidator's commercial decision for him. Indeed the court is always reluctant to credit itself with any degree of competence in this field at all. ...

E

[21] The above statement of law was quoted with approval and applied in the case cited by the contributories, namely *Re Kian Joo Holdings Sdn Bhd (in liquidation)* at para 16). In this case, Selventhiranathan J added:

F Accordingly, it is my view that s 237(3) of the Act should only be resorted to by the liquidators if a difficulty arises in the course of their administration of the winding up, in which event they are obliged to inform the court and take directions, and not otherwise. In the present case, no evidence was forthcoming of any difficulty having arisen in relation to any particular matter in the winding up as stipulated in s 237(3) of the Act.

G

[22] In my view, *Senderson v Classic Car Insurances Pty Ltd* and *Re Kian Joo Holdings Sdn Bhd (in liquidation)* propound the correct test as to when the liquidator as an officer of the court can apply to the court for directions H pursuant to s 237(3). The liquidator must encounter a difficulty in the course of winding up before he can resort to this provision. The only proper subject of a liquidator's application for directions is the manner in which the liquidator should act in carrying out his functions. Directions which would have the propensity to undermine s 237(4) of the Companies Act must be refused. The I liquidator must avoid seeking directions on matters which fall within his discretion in order to absolve himself of responsibility for making a difficult commercial decision nor to avoid any challenge by the contributories against his decision to sell the assets of the company.

[23] Having dealt with the scope of s 237(3) of the Companies Act, I turn now consider the submissions of the parties.

WHETHER LIQUIDATOR IS FACED WITH A DIFFICULTY

[24] The first issue has to do with whether the liquidator is faced with a difficulty in the winding up of the respondent. The main thrust of the contributories argument is that there is no difficulty as liquidator has full powers under s 236(2) to sell properties of the respondent without a court order. The decision in *Kian Joo Holdings Sdn Bhd (in liquidation)* dictates the outcome in this case.

[25] In light of this contention, it is necessary now to consider more closely the reasoning in *Re Kian Joo Holdings Sdn Bhd (in liquidation)*. In that case the liquidator sought directions because the contributories did not agree on the manner in which the assets of the company were to be deal with. The liquidator sought approval of the court to sell the assets of the company in such manner and on such terms as the liquidator deemed to be in the interest of the company. In dismissing the application, Selventhiranathan J explained:

> Having considered the submissions and authorities cited by learned counsel, I was of the view that this application by the liquidators was not appropriate under s 237(3) of the Act ...
>
> Enclosure (1), although couched to be an application pursuant to s 237(3), was in fact not an application for directions under that provision but was instead an application for the court to exercise the discretion which ought to be exercised by the liquidators ...'. With respect, the issue whether the liquidators ought to be permitted the sale or not did not arise in the in the circumstances obtaining because the law as provided for in s 236(2) of the Act clearly permitted the liquidator the sale.
>
> Further, an application for directions under s 237(3) of the Act would entail consideration of the details of how a particular matter arising under the winding up was to be treated, implemented or carried out. In this case the liquidators were not asking for any directions on the details of the sale. As counsel rightly submitted, the terms of a sale of the assets of the company would be a commercial decision best left in the hands of the liquidators as the legislature intended it to be. Just because there was a difference of views amongst the contributories, the liquidators should not be divested of the responsibility of making a decision ...

[26] It is clear from the foregoing that the application was dismissed as the court found no evidence to show the liquidator was facing any difficulty in relation to any particular matter in the winding up. The properties were owned by the respondent and the liquidator was empowered to sell them without a court order. This postulate immediately distinguishes *Re Kian Joo Holdings Sdn Bhd (in liquidation)* from the present case as the respondent is not the registered owner of the land here.

[27] The contributories contend that though the respondent is not the registered owner, the principle in *Re Kian Joo Holdings Sdn Bhd (in liquidation)* still applies as the respondent is the beneficial owner of the land. It is said that the respondent is the beneficial owner of the land as by the consent judgment the state government had agreed to transfer the land to the former upon payment of the sums mentioned. The respondent will loose beneficial interest only if there is a default in these payments.

[28] The liquidator disputes the contention that the respondent is the beneficial owner of the land.

[29] In light of the competing positions of the parties, the question arises, is the respondent the beneficial owner of the land. In this connection, it is instructive to refer to the judgment of the Federal Court in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193 where this issue of when a purchaser becomes a beneficial owner was considered. It was held:

(1) According to the principle of beneficial ownership, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price, besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he has yet to become its registered owner. In the circumstances, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property. (paras 34 & 37)

(2) The principle of beneficial ownership as enunciated in *Borneo Housing* applies equally to both negotiated contracts as well as statutorily formatted contract. The intention of the Act as well as all the subsequent Enactments and the subsidiary legislations is to merely protect the intending purchaser. It is not intended to abrogate or undermine the rights of purchaser under the common law or in equity. (paras 41 & 42)

(3) It is trite that in a transaction involving landed property, the principle under the law of contract will govern the sale transaction until registration of title is effected under the NLC. Any transaction which was not done in accordance with the then existing law relating to registration of title, conferred no real right to the land but merely a contractual right. Based on the ordinary sale and purchase transaction, the purchaser will acquire a right *ad rem* or a right *in personam*. These rights will be conferred to the purchaser immediately after contracting parties entered into a contract for the sale and purchase of property.

(4) The plaintiff was at best clothed with a right *ad rem* or a right *in personam* as against the second defendant upon the execution of the first SPA and payment of the sum of RM5,250 to the second defendant. The plaintiff's

rights rested solely in contract as against the second defendant and no cause of action could lie against the first defendant who was a complete stranger to the contract. The plaintiff was unfortunately left without remedy as the second defendant had been wound up.

(5) The first defendant acquired his right through Mohd Ismail and having paid the full purchase price, in law, he assumed the position of a beneficial owner. The fact that Mohd Ismail was the brother of one of the director of the second defendant did not automatically give rise to a conclusion that Mohd Ismail had notice of the earlier SPA. There was no evidence to show that the information had ever been communicated to Mohd Ismail or the first defendant. Further, there was not an iota of evidence to show that there had been a collusion or conspiracy between the first defendant and Mohd Ismail. In the circumstances, the first defendant was an innocent purchaser for value without notice and as the beneficial owner of the property, the first defendant enjoyed a right *in rem* over the property. The first question was thus answered in the positive.

(6) Section 340(1) of the NLC only speaks of registered title or interest. Therefore, the proviso to s 340(3) of the NLC did not apply to the instant case as the strata title was yet to be issued at the material date.

[30] The case illustrates that only upon full payment of the purchase price, equity accords the respondent with all the rights and privileges of a beneficial and legal owner over the land. In the instant case, it is not in dispute that the full purchase price has not been paid. The contention advanced by the contributories that the respondent is the beneficial owner of the land is without foundation.

[31] The liquidator thus cannot make any commercial decision with regard to the land, as it is not the asset of the respondent. He cannot perforce hold a tender exercise or public auction of the land as sought by the contributories. This argument that the liquidator ought to tender the sale of the said land by a public auction, I agree with counsel for the liquidator, is like putting the cart before the horse. The liquidator would be committing an offence if he publishes the sale of the land, neither owned by the respondent nor within his control.

[32] In addition, the position taken by the contributories that the petitioner ought to advance the requisite sums of money so that the liquidator can auction the said land is wholly untenable. As the respondent is in liquidation, the only means of raising the requisite sum pursuant to Form 5A is through an advance made by either the contributories or the creditors for the time being. The liquidator cannot borrow money to manage the affairs of the respondent in liquidation. The contributories, despite been accorded first priority to advance the said sums of money to enable the respondent to satisfy the consent judgment to be the beneficial and legal owner of the land, have failed to provide

A the required amount. The petitioner here is only willing to give an advance if the land is sold to it at market price.

[33] The primary function of the liquidator is to wind up the respondent company's business, realise its assets, pay off the creditors and return whatever B is left over to the contributories. In the present case, the respondent has no other assets. Without accepting the advance and conditions of the petitioner, the liquidator would not be able to secure the land in favour of the respondent.

C **[34]** In the circumstances, it is clear that the liquidator has no alternative other than to seek directions pursuant to s 237(3) of the Companies Act as a difficulty has arisen in the course of his administration of the winding-up of the respondent. Failure to pay the said sum of RM3.5m and RM596,047 on or before 27 October 2016 pursuant to the consent judgment and Form 5A D undoubtedly will cause loss of the land and the respondent would not be able to pay off the creditor, being the very purpose of liquidation. A failure to secure the land would render the liquidation in futility.

[35] The liquidator is obliged to inform the court of his difficulty and take E directions on whether to utilise the payments of advance by the petitioner and enter into a private treaty with the creditor to sell the land on the basis that this may be the only option to satisfy s 236(1)(b) of the Companies Act in order to pay the creditor in full. Section 236(1)(b) requires the liquidator, subject to s 292, to pay any class of creditors in full. The liquidator has to get the required F amount of money to secure the land so that it can be realised to settle the creditor, whose interest would rank in priority over the contributories. The questions raised in this application are to protect the liquidator against accusations of acting unreasonably in the discharge of his duties.

G **[36]** I therefore reject the contention that there is no difficulty faced by the liquidator and the situation which confronts me is covered by *Re Kian Joo Holdings Sdn Bhd (in liquidation)*.

H **[37]** In any event, even if the land here belongs to the respondent, s 236(3) stipulates that the exercise by the liquidator of the powers conferred by this section shall be subject to the control of the court (see *North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals* [2013] 3 MLJ 617; [2013] 3 CLJ 1101 (FC)). Further, s 236(1)(c) of the Companies Act provides that the I liquidator may with the authority either of the court or of the committee of inspection make any compromise or arrangement with creditor having any claim against the company.

WHETHER LAND IS FOR RESIDENTIAL OR COMMERCIAL USE

[38] That brings me to the contributories second objection to the application. It is based on Form 5A which the liquidator received on 28 July 2016. The heading of Form 5A read:

> PERMOHONAN TANAH KERAJAAN LOT 13587 DAN LOT 13606 SELUAS 27.27 HEKTAR (52.57 EKAR) BAGI TUJUAN SKIM PERNIAGAAN DI MUKIM BOTA, DAERAH PERAK TENGAH

[39] Counsel for the contributories take the position that the use of the word 'Perniagaan' in the Form indicates that the land is commercial land. However, the petitioner's offer to buy the land is based on the footing it is residential land. The land would be worth RM48m if commercial land titles are issued as stated in Form 5A. To sell the land at RM17.3m would be grossly unfair and prejudicial to them as they are entitled to any surplus after the creditors. Counsel produced a valuation report during submissions to contend that the land was worth in excess of RM17.3m even if it is for residential use.

[40] I find no merit in this objection. The contention that the land use is for commercial is contrary to the clear terms in the consent judgment and letter dated 16 May 2016 from Pengarah Tanah and Galian. Paragraph 2(iii) of the consent judgment states 'Suratan hakmilik bagi hartanah tersebut hendaklah bagi kegunaan kategori perumahan', whilst the letter dated 16 May 2016 from Pengarah Tanah dan Galian categorically states that the express condition of the title would be 'Tapak Kediaman, Bangunan — Kediaman'. In the face of these two documents, it is apparent that there has been a clerical or inadvertent mistake in Form 5A.

WHETHER THE LIQUIDATOR IS PARTIAL

[41] The third objection is premised on the allegation that liquidator is partial and favours the petitioner. I accept that a liquidator appointed by the court must be impartial and must be seen to be impartial. The contributories rely on two facts to allege partiality. First, the liquidator's rejection of a higher offer to purchase the land by a company called BS Johan Sdn Bhd. Secondly, the failure to appoint a committee of inspection as required by s 241 of the Companies Act. The contributories complain that despite several requests from them, the liquidator has not set up a committee of inspection.

[42] I take first the complaint about a higher offer. It is true that BS Johan Sdn Bhd had offered to purchase the land for RM200,000 more than the petitioner. It is in evidence that the liquidator returned the cheques offered by BS Johan Sdn Bhd on the basis that it is precarious to deal with unknown party as he had not undertaken any tender exercise or public auction with regard to

A the land as the respondent did not own it. I find the action of the liquidator in returning the cheque does not demonstrate partiality in any way as the liquidator has no power to sell the land to BS Johan Sdn Bhd as the same is not an asset of the respondent.

B **[43]** As for the complaint based on the liquidator's failure to appoint a committee of inspection, I accept that the liquidator must act with this committee in all circumstances, and particular when exercising the power to sell properties. This is lucidly articulated by the Federal Court in *North Plaza Sdn Bhd v Equiticorp Holdings Ltd and other appeals* (at para 37). In this C connection, Zulkefli CJ (Malaya) stated:

> [11] We would state here that the importance of the appointment of a committee of inspection cannot be overlooked. The intent and purpose of the appointment is to ensure check and balance in respect of the liquidator's acts. If this is not done the D consent order that ordered liquidator to be appointed together with the committee of inspection would be rendered redundant. On this point we would cite the case of *Woodsville Sdn Bhd v Tien Ik Enterprise Sdn Bhd & Ors* [1998] MLJU 659 dated 31 May 2000 at pp 51–53 wherein His Lordship Abdul Aziz Mohamed J (as he then was) in his judgment had this to say:
>
> E > One thing to note is that the committee of inspection, as the general body of creditors and contributories, are not advisers to the liquidator. They are people, as representing the creditors and contributories, who have claims on the company. They are the master. The liquidator is to serve their interests. So they are empowered, as they naturally should be, to give directions to the liquidator.
>
> F > A wish of the committee of inspection is a direction to the liquidator. Their wish is his command.
>
> > In our judgment the liquidator must act with the committee of inspection in all circumstances, and in particular when exercising the power to sell properties.

G **[44]** It is to be noted that in the above case, an order was expressly made for a committee of inspection to be set up. In the present instance no such order was made. Further, in my view, the cases cited by the contributories in support of their argument that the liquidator should not sell the land until a committee H of inspection is set up are distinguishable from the instant case. In the authorities referred to by the contributories, the property was owned by the company in liquidation, whereas, here the respondent has no assets.

[45] Further, s 237(1) of the Companies Act, inter alia, provides that any I directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection. In this case, the contributories are disagreeing with the petitioner's direction and this renders the committee of inspection is redundant. Section 237(1) reads:

> Subject to this Part *the liquidator shall in the administration of the assets of the*

company and in the distribution thereof amongst its creditors have regard to any directions given by resolution of the creditors and contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection. (Emphasis added.)

DIRECTIONS

[46] The consent judgment requires the respondent to make the payments to the state authority by 27 October 2016. It further provides that the respondent may seek a three month extension until 26 January 2017 to make these payments, and if the extension sought is granted, interest of 6%pa has to be paid.

[47] In the circumstances, I direct that in the event extension of time sought on the settlement of the purchase price and premium in accordance with the consent judgment is refused by the state authority, the liquidator in his capacity as liquidator of the respondent is at liberty to take appropriate steps to secure and sell the land.

Order accordingly.

Reported by Nisha Paran